

ENCLOSURE 3

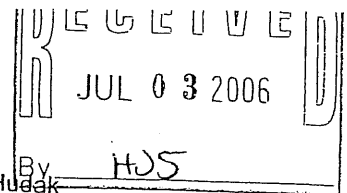
**Comments from designated party Davis/Coffeng dated
June 30, 2006 on the June 16, 2006 revised proposed
Administrative Civil Liability Order**

10-0035

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Mark D. Hudak
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June 30, 2006

Lahontan Regional Water Quality Control Board
c/o Harold Singer, Executive Officer
2501 Lake Tahoe Boulevard
South Lake Tahoe, CA 96150

Re: Administrative Civil Liability Proceeding No. R6T-2005-0029
C. Geoffrey and Christine Davis, et al.

Dear Water Board Members:

Our office represents C. Geoffrey and Christine Davis and is co-counsel for Hans and Margaret Coffeng in this matter.

We reviewed the revised proposed order prepared the prosecutors. Sadly, the proposed order is completely one-sided and ignores all of the explanatory and mitigating evidence produced at the hearing on May 11, 2006. About the only revision from the initial order is the admission that the prosecuting staff committed a serious math error in the initial complaint and overstated the maximum discharge by 56%.

I would like to bring just a few of the most glaring omissions in the prosecutors' order to the Board's attention. The proposed order:

- Insists on utilizing the gross maximum amount of sewage that could have been discharged from the punctured sewer main (56,000 gallons) to set the amount of civil liability and ignores the amount of discharge that was recovered at the site. When this factor is taken into account, only 10,000-19,000 gallons of sewage actually reached the waters of Lake Tahoe, which is certainly a more reasonable starting point for assessing liability.
- Ignores the facts that the homeowners hired local consultants and a qualified local marine contractor and obtained every required governmental approval and permit.

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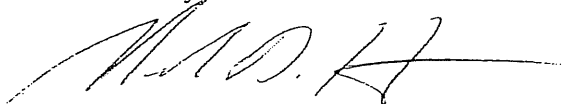
- Does not mention the fact that the agencies issuing the permits and approvals for this project were on notice that a sewer force main might be located in this beach area but did not notify the homeowners or their consultants.
- Does not recognize the fact that the presence of the force main beneath the beach was not marked in any fashion and, instead, there is misleading signage along North Lake Boulevard, within 200 feet of the subject properties, which represents that the sewer force main is located alongside the roadway, not under the beach. This factor is a significant cause of the accident.
- Ignores the failure of North Tahoe Public Utility District to have on hand the emergency repair equipment called for in its own Emergency Response Plan. Had this equipment been available, a significant amount of harm could have been avoided.
- Refuses to give any weight to the tax returns and financial statements submitted by Pacific Built to show its inability to pay, even though the prosecutors presented no contrary evidence and gave no cogent reason why the Board should not accept these records at face value.
- Does not recognize the legal principles that make a contractor responsible for its failure to follow legal regulations specific to its profession and that exempt an innocent homeowner from liability if the contractor fails to do so.

In sum, the proposed order does not account for the substantial amount of evidence presented at the hearing by the homeowners and Pacific Built in any manner. I am confident that the Board intends to take all of these factors into account, as required by law and fundamental fairness. The ultimate order should reflect all of the facts and circumstances that led to this tragic accident, even if some of those facts involve failures by public agencies.

Rather than attempting to critique the prosecutors' order on a line-by-line basis, I am enclosing a proposed order for the Board's consideration. I hope that it will prove a better reflection of the Board's evaluation of the evidence than the overly-simplistic approach proposed by the prosecutors.

I look forward to meeting with the Board again on July 25-26 and seeing this matter to conclusion.

Sincerely,



Mark D. Hudak

MDH:os

Enclosure

10-0037

June 30, 2006

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10-0038

**CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
LAHONTAN REGION**

ADMINISTRATIVE CIVIL LIABILITY ORDER NO. R6T-2006

ADMINISTRATIVE CIVIL LIABILITY COMPLAINT

C. GEOFFREY AND CHRISTINE DAVIS

HANS AND MARGARET COFFENG

PACIFIC BUILT, INC.

**FOR ALLEGED VIOLATION OF WASTE DISCHARGE PROHIBITIONS
PRESCRIBED IN THE *WATER QUALITY CONTROL PLAN FOR THE
LAHONTAN REGION* FOR THE UNAUTHORIZED DISCHARGE OF
UNTREATED DOMESTIC SEWAGE WASTEWATER TO THE LANDS BELOW
THE HIGH-WATER RIM OF LAKE TAHOE
AT 7770 AND 7780 NORTH LAKE BOULEVARD, KINGS BEACH
ON JULY 19, 2005**

The California Regional Water Quality Control Board, Lahontan Region ("Water Board") finds:

1. Parties

Hans and Margaret Coffeng are the legal owners of a residential property commonly known as 7770 North Lake Boulevard, Kings Beach, Assessor's Parcel Number 117-180-017. C. Geoffrey and Christine Davis own the residential property commonly known as 7780 North Lake Boulevard, Kings Beach, Assessor's Parcel Number 117-180-018.

Pacific Built, Inc. ("Pacific Built") is a licensed contractor specializing in marine contracting in the Lake Tahoe area.

2. The Project

The Coffengs and Davises constructed a multi-use pier on the common property line between their two properties. They entered into a contract with Pacific Built to construct the pier. Prior to the start of construction, the Coffengs and Davises obtained all permits and approvals for the project, including: a TRPA permit, a Section 401 Certification from the Water Board, an exemption from the California State Lands Commission, a Streambed Alteration permit from the California Department of Fish & Game, and General Permit 16 from the Army Corps of Engineers. In addition, the project was reviewed twice by the interagency Shorezone Review Committee and recommended for approval.

10-0039

3. Facts Relating To Discharge

A 14" force sewer main is located under the beach area behind the Davis and Coffeng homes. This force main is owned and maintained by the North Tahoe Public Utility District ("NTPUD").

There are no signs or other markings to signal the presence of the force main beneath the beach. Instead, there are signs along North Lake Boulevard indicating that the force main is located along or beneath the roadway. One such sign is located alongside North Lake Boulevard about 200 feet from the Coffeng residence and appears to indicate that the force main continues along the roadway past the Coffeng and Davis homes. The Davises and Coffengs were not aware that the force main was located under the beach behind their homes. Their local consultants also were unaware of the presence of the force main under the beach in this area.

Pacific Built was not aware that the force main was located under the beach in the area of their work. Pacific Built participated in the TRPA "On-Site Pre-Grading Inspection" before beginning its work. At the inspection, TRPA inspected the site and reviewed the TRPA permit conditions. The force main was not mentioned at this pre-construction inspection. Pacific Built did not call the Underground Service Alert for Northern California and Nevada ("USA North") before beginning construction.

On July 19, 2005, Pacific Built was driving pilings for the multi-use pier and punctured the force main. An estimated 56,000 gallons of sewage were released from the force main.

Pacific Built constructed berms and contained much of the spill on the beach area. Workers from several public agencies responded to the scene. A trash pump was employed to pump some of the sewage to the sewer main along North Lake Boulevard. Later, vac-trucks were employed to suction sewage and water from containment areas. A substantial portion of the discharge was removed by these means on July 19 and 20. An unknown quantity of sewage reached the waters of Lake Tahoe itself.

As a result of the sewage spill, five beaches were closed to the public and all private beaches between the public beaches were closed as well. Four of the public beaches remained closed to the public for 10 days following the discharge and the fifth beach was closed for 16 days.

4. Alleged Violations

The administrative complaint alleges violations of the following prohibitions of the *Water Quality Control Plan for the Lahontan Region* (the "Basin Plan"), adopted pursuant to Water Code section 13243:

10-0040

A. "The discharge of treated or untreated domestic sewage, garbage, or other solid wastes, or any other deleterious material to the surface waters to he Lake Tahoe Basin is prohibited."

B. "The discharge, attributable to human activities, of solid or liquid waste materials, including soil, silt, clay, sand, and other organic and earthen materials to lands below the high-water rim of Lake Tahoe within the 100-year floodplain of any tributary to Lake Tahoe is prohibited."

Unless excused, the discharge of sewage as a result of the puncture of the force main would be a violation of these provisions.

5. Administrative Civil Liability Authority

The Water Board may impose civil liability for violations of the Basin Plan pursuant to Water Code section 13350(a)(2), which provides:

(a) Any person who ... (2) in violation of any waste discharge requirement, waiver condition, certification, or other order or prohibition issued... by a regional board or the state board, discharges waste... except in accordance with waste discharge requirements or other actions or provisions of this division, shall be civilly liable and remedies may be proposed, in accordance with subdivision (d) or (e).

Untreated sewage constitutes "waste" as defined in Water Code section 13050.

The Water Board notes that there are significant inconsistencies within Water Code section 13350 regarding the standard for liability. Subsection 13350(b) expressly provides for strict liability in the case of discharges of certain hazardous materials. Subsection (a) does not mention strict liability. There are exemptions from strict liability set forth in subsection (c), but they expressly apply only to subsection (b). This anomaly would result in a lower standard for liability under subsection (b) than subsection (a).

In the absence of direction from the State Board or a court, the Water Board will consider the reasonableness of the acts of each party, their degree of culpability or fault, and the contributing fault of third parties in determining whether to impose civil liability under Section 13350(a).

6. Factors Affecting the Imposition of Civil Liability and the Amount of Civil Liability

Water Code section 13327 requires the Water Board to consider enumerated factors when determining the amount of civil liability under water Code section 13350. The Water Board also should consider these factors in determining whether to impose civil liability under Section 13350(a). The Water Board has considered these factors and finds as follows:

a. The nature, circumstances, extent, and gravity of the violations

Lake Tahoe has been designated an Outstanding Natural Resource Water because of its extraordinary clarity, purity, and deep blue color. However, the lake's clarity has been decreasing due to nutrient and fine sediment discharges associated with human activities. As a result, Lake Tahoe is listed on the Federal Clean Water Act Section 303(d) list as impaired due to excessive sediment and nutrients. Under these circumstances, every effort must be made to prevent discharges, and each illegal discharge must be dealt with in a manner that will discourage future discharges.

In this instance, the discharge was tragic and severe. It had a major impact on visitors, residents, and lakeside businesses during the vacation season.

The administrative complaint issued by the Lahontan Assistant Executive Officer claimed that over 120,000 gallons of raw sewage was discharged through the puncture in the force main and sought a civil liability of \$700,000. During the public hearing, Lahontan staff engineers acknowledged that their calculations were incorrect and that only a maximum of 56,000 gallons could have been discharged from the puncture. Following this admission, the prosecuting staff reduced the amount of requested civil liability proportionally, to \$325,000. Experts for the Davis and Coffeng families and Pacific Built testified that the likely amount of discharge was less than 56,000 gallons.

The discharge likely could have been prevented if Pacific Built had called USA North. When contacted, USA North is required to notify its participating members who must mark underground utilities in the construction area within 48 hours. Presumably, if Pacific Built had called, USA North would have contacted NTPUD and NTPUD would have marked the force main.

However, the duty to call USA North is not absolute. Under Government Code section 4216.2(a), the contractor is required to contact the appropriate regional center "if the excavation will be conducted in an area which is known, or reasonably should be known, to contain subsurface installations...."

Pacific Built argues that it was not reasonable to suspect that there was a sewer force main buried beneath the beach. There were no warning signs on the beach and no physical characteristics, such as cleanouts or manholes, to indicate a subsurface sewer installation. None of the permits or other documents furnished to Pacific Built mentioned the sewer line or a utility easement. Pacific Built's policy is that it never calls USA North, but would call a local utility agency directly if there was an indication that the agency had subsurface installations in the area.

The Water Board finds that the signage installed by NTPUD is outdated and misleading, as it would lead a reasonable person to conclude that the force main is located alongside North Lake Boulevard, not beneath the beach, in this neighborhood. This factor justifies reducing the liability from the maximum amount.

10-0042

The Water Board is concerned that all public agencies were on notice that there was a force main buried beneath this beach and others along the Lake Tahoe shoreline. These facts were revealed in a 2003 Army Corps of Engineers report that was compiled with the assistance of the Lahontan staff, NTPUD, TRPA, and other local agencies. Despite having this knowledge, none of the agencies incorporated it in their permitting processes. Consequently, the Coffengs and Davises obtained permits and approvals from no less than five agencies -- including Lahontan itself - and were never notified that there could be a force main under their beaches that should be investigated.

b. Whether the discharge is susceptible to cleanup or abatement

According to testimony at the public hearing and in the briefs, approximately 56,000 gallons of untreated wastewater escaped from the punctured force main. Through the use of berms and other containment, pumping, and vacuor trucks, a significant amount of the discharge was recovered and taken off-site on July 19. Further, NTPUD reported that it recovered an additional 47,000 gallons from containment areas on July 20. While it is difficult to calculate the exact amount of sewage that actually reached the waters of Lake Tahoe itself, the prosecuting staff puts the number at 19,000 gallons and the defendants' experts believe that it is closer to 10,000 gallons.

The Water Board notes that the lead agency responsible for dealing with the spill, NTPUD, did not have the necessary repair equipment (a circle clamp) available for this emergency, as required by its own Emergency Response Plan. Had the circle clamp been available, a significant amount of the wastewater discharge may have been contained, thereby lessening the amount that reached the waters of Lake Tahoe.

Although any discharge of wastewater beneath the high-water rim of Lake Tahoe is a violation of the Basin Plan, the Water Board finds that civil liability in this instance should be based on the amount of wastewater that was not recovered and actually reached the waters of Lake Tahoe.

c. The degree of toxicity of the discharge

No analysis was performed to determine the degree of toxicity of the wastewater that was discharged, but it is assumed that the discharge contained pathogens that could cause illness and, in rare cases, death to persons who ingest or come in contact with it. Thus, while not toxic, the sewage discharged did create a condition with potentially harmful effects on humans.

d. Ability to pay

Pacific Built submitted tax returns and financial statements that were accepted in evidence. These financial records establish that the company is losing money and has a limited ability to pay a civil liability. The prosecuting staff did not present any testimony or evidence to contradict the information in the financial records submitted by Pacific Built. The Water Board finds that the tax returns, filed under penalty of perjury, and the

financial statements, prepared in the ordinary course of business, are reliable and that they establish a limited ability to pay on Pacific Built's part. This factor justifies reducing the liability from the maximum amount.

The Coffeng and Davis families did not argue an inability to pay.

e. The effect on the parties' ability to continue its business

Pacific Built is a family-run business that has been performing marine contracting in the Lake Tahoe area for some 30 years and is one of only a limited number of marine contractors. Pacific Built's representatives claim that a significant civil liability assessment would threaten the company's ability to stay in business. This testimony, consistent with the tax returns and financial records in evidence, supports a finding that a substantial civil liability assessment against the company would jeopardize its ability to stay in business. This factor justifies reducing the liability from the maximum amount.

The Davis and Coffeng families were not engaged in business activities, so this factor is not relevant as to these parties.

f. Any voluntary cleanup efforts undertaken by the parties

Pacific Built immediately contacted NTPUD to report the puncture. Pacific Built employees constructed berms to partially contain the spill. Pacific Built employees provided assistance to NTPUD to evacuate the beaches. Pacific Built employees remained at the site until all cleanup activities were completed. Pacific Built offered additional assistance to NTPUD's crews, including installation of vector pumps at the puncture point instead of at containment ponds, but NTPUD declined this aid. Pacific Built's efforts after the puncture justify reducing liability from the maximum amount.

g. History of prior violations

The Davis and Coffeng families have no history of prior violations.

Pacific Built itself has no history of violations. A member of the family that owns and operates Pacific Built was involved in dredging operations at Fleur Du Lac in 1989. This 17-year old incident does not indicate a propensity by Pacific Built to ignore applicable regulations so as to warrant an upward adjustment of civil liability.

h. Degree of culpability

The Davis and Coffeng families are not directly responsible for the discharge. They followed all applicable procedures to obtain approval for the multi-use pier. They hired local consultants to assist them in this process. They obtained approvals or permits from five separate public agencies as well as the interagency Shorezone Review Committee. This process took over four years. Once all approvals were obtained, they hired a licensed, bonded and experienced local contractor, Pacific Built, that specializes

in pier installation. At no time did the Davises and Coffengs or their consultants attempt to avoid or evade the legal regulations applicable to their project. The Davis and Coffeng families and their consultants acted responsibly at all times.

Although the prosecuting staff contends that the Davis and Coffeng families should be held liable for Pacific Built's failure to call USA North, that position is not consistent with California law. Government Code section 4216.2 places responsibility for calling USA North squarely on the excavator. Government Code section 4216.8 exempts owners of property who contract with a licensed contractor for a project where (as here) no building permit is required. A homeowner should be able to rely on contractors to follow legal regulations that are specific to the contractor's business and should not be held liable if the contractor fails to do so.

Under these circumstances, the Water Board finds that the Davis and Coffeng families should not be held civilly liable under Water Code section 13350(a).

Pacific Built offered expert testimony that the standard of care for marine contractors working on Lake Tahoe does not require contacting USA North when excavating on this type of project. The prosecuting staff did not offer rebuttal expert testimony on this point.

[Alternative 1] The Water Board finds that Pacific Built did not have a duty to call USA North under these circumstances. Pacific Built did not know, and should not reasonably have known, of the possible presence of subsurface utilities in this area. The Water Board finds that the signage installed by NTPUD along North Lake Boulevard was misleading and would cause a reasonable person to believe that the force main was located alongside or beneath the roadway, not under the beach. None of the permits and other information provided to Pacific Built disclosed the possible presence of the force main. Therefore, it would not be fair to impose civil liability on the contractor for failing to call USA North.

[Alternative 2] The Water Board finds that, given its experience, Pacific Built should have been aware of the possibility that there was a subsurface installation of some kind in this area and should have taken called USA North. This finding is supported by evidence that Pacific Built has performed at least some prior work that involved utilities installed beneath the high water rim at Dollar Point. Had Pacific Built contacted USA North, or contacted NTPUD directly, it is likely that this entire incident could have been avoided.

i. Economic savings resulting from the violation

There were no economic savings resulting from the violation. The violation was an accident, and did not result from an attempt to avoid costs or restrictions.

j. Other matters as justice may require

The sewage spill and resulting beach closures were the subject of much public attention. Interest in the outcome of this proceeding remains high, as evidenced by the attendance and number of speakers at the public hearing. This presents an opportunity for the Water Board to reinforce points made during the hearing.

The public relies on licensed general contractors for their expertise and experience. The civil liability imposed in this case should send a message to the contracting community that a high degree of care must be exercised when working in the Lake Tahoe Basin.

An equally high degree of care is expected from the public agencies that safeguard Lake Tahoe and its environs. It is deeply troubling that so many agencies – including Lahontan itself – reviewed the multi-use pier project and granted approvals or permits without noticing that the construction would be taking place in an area that the agencies knew to have sewer lines beneath the beach. Apparently, none of the applications submitted in connection with this project required notice to or approval from NTPUD. This is an oversight that should be corrected.

NTPUD also should respond quickly by revising its signage and installing appropriate markings on beach areas where it has installed subsurface sewer lines. Had better signage been in place, it is likely that this discharge could have been avoided altogether.

Testimony established that temporary repairs, including the installation of a circle clamp, could have significantly reduced the amount of sewage being discharged from the puncture, but NTPUD did not have the parts available and did not want to perform temporary repairs. The explanation of the NTPUD Executive Director was that temporary repairs would not have been “cost effective.” The Water Board disagrees – every means should have been utilized to reduce the amount of sewage escaping from the force main. Installing a circle clamp, or even a wedge to limit the size of the opening, would not have been very expensive, and the cost would be recoverable from the parties. It is hardly fair to hold the parties fully responsible for the portion of the discharge that could have been avoided by reasonable temporary measures.

7. Civil Liability – California Water Code

For the discharge of wastes to surface waters in violation of the Basin Plan, pursuant to Water Code section 13350(a)(2), the Water Board may impose civil liability pursuant to Water Code section 13350(e)(2). Section 13350(e)(2) provides for civil liability not to exceed \$10.00 per gallon of waste discharged.

In this matter, the maximum liability is \$560,000 for a discharge of 56,000 gallons of sewage. However, the Water Board finds that, in view of the accidental nature of this discharge and the cleanup activities conducted by Pacific Built, civil liability

should be based on the amount of sewage that was not recovered, which is estimated to be 10,000-19,000 gallons.

In the administrative complaint, the prosecuting staff does not urge the maximum liability of \$10.00 per gallon. Rather, it recommends a civil liability of \$325,000 for 56,000 gallons, or approximately \$5.80 per gallon. Using that standard, the maximum civil liability for the unrecovered discharge amount would be \$58,000 - \$110,200. This maximum is subject to adjustment based on the factors discussed herein.

8. Administrative Civil Liability Complaint Issued by Assistant Executive Officer

The Water Board Assistant Executive Officer issued Administrative Civil Liability Complaint No. R6T-2005-0029 on December 14, 2005. The administrative complaint was properly served on all parties named therein.

9. Public Hearing

On May 11, 2006, the Water Board held a public hearing on the administrative complaint. The hearing was properly noticed. The parties were present and represented by counsel. Members of the public were given an opportunity to submit written comments in advance of the hearing and to make oral comments during the hearing. The Water Board has considered all evidence submitted by Lahontan staff, the parties, and the public. The Water Board closed the public hearing portion of the proceeding on May 11.

On July ____, 2006, the Water Board received comments from the prosecuting staff and parties regarding the form of a proposed order and findings and conducted its deliberations on this matter.

10. Findings and Conclusions

The Water Board finds that the Davis and Coffeng families acted responsibly and prudently in engaging local consultants and contractors and by obtaining all necessary permits and approvals before beginning construction of the multi-use pier. It would not be fair or reasonable to hold them civilly liable for the accidental discharge of sewage from their properties under these circumstances. California law does not require that they be held liable for the failure of Pacific Built to contact USA North. No deterrent effect would be achieved by imposing liability on these parties. The Water Board imposes civil liability of \$0.00 on these parties.

[Alternative 1] The Water Board finds that Pacific Built did not have a duty to call USA North because the company did not know, and should not reasonably have known, that there were subsurface utilities in the proposed area of excavation. The Water Board assigns civil liability of \$0.00 to this party.

[Alternative 2] The Water Board finds that Pacific Built should have called USA North before beginning construction and therefore is civilly liable. The Water Board

assigns civil liability of \$_____ to Pacific Built. This amount is based on careful consideration of the following factors:

- Whether Pacific Built had a duty to contact USA North is not clear-cut.
- NTPUD's signage on Lake Boulevard was misleading and may have contributed to Pacific Built's decision not to contact USA North.
- None of the permits or other information provided to Pacific Built disclosed the possible presence of a force main under the beach.
- Pacific Built has limited ability to pay
- Pacific Built would not be able to continue in business if a greater civil liability is imposed.
- Pacific Built notified NTPUD immediately and assisted in cleanup activities
- The amount of civil liability should reflect that a substantial amount of the discharge was contained and recovered. Civil liability should be based on the estimated amount of sewage that actually reached the waters of Lake Tahoe, not the number of gallons that were estimated to have escaped from the force main.
- The amount of civil liability should be reduced to reflect the estimated amount of discharge that could have been avoided through the employment of reasonable temporary repairs.

IT IS HEREBY ORDERED that, pursuant to Water Code section 13350(a)(2):

1. No administrative civil liability shall be imposed on the Davis and Coffeng families and the Administrative Complaint is dismissed as to them.
 2. No administrative civil liability is imposed on Pacific Built and the Administrative Complaint is dismissed as to this party.
- /or/
2. Administrative civil liability is imposed on Pacific Built in the amount of \$_____. The entire amount shall become due and payable 90 days after this Order is adopted.
 3. If the above civil liability is not paid in full at the Water Board's South Lake Tahoe office by said date, this matter will be referred to the Attorney general for collection.

I, Harold J. Singer, Executive Officer, do hereby certify that the foregoing is a full, true, and correct copy of an Order adopted by the California Regional Water Quality Control Board, Lahontan Region, on July ___, 2006.

HAROLD SINGER
EXECUTIVE OFFICER

10-0048